No. 91-1058

In the Supreme Court of the United States

OCTOBER TERM, 1991

HAYDEE MCBRIDE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), authorizes the Attorney General to grant certain discretionary relief to aliens who have had a "lawful unrelinquished domicile" in the United States for "seven consecutive years." The issue in this case is whether time spent in the United States as a nonimmigrant visitor may be used to establish that an alien has had a "lawful unrelinquished domicile" for the seven-year period.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-5) is unpublished, but the judgment is noted at 943 F.2d 57 (Table). The decision of the Board of Immigration Appeals (Pet. App. 7-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1991. The court of appeals denied a petition for rehearing on November 22, 1991. Pet. App. 1-2. The petition for a writ of certiorari was filed on December 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATMENT

1. Petitioner is a native and citizen of Venezuela. She entered the United States in July of 1985 as a nonimmigrant visitor under 8 U.S.C. 1101(a)(15)(B), which covers an alien "having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." In December of 1985, she became a lawful permanent resident. In May of 1989, she was convicted in a Colorado state court of possession of a controlled substance. Pet. App. 7; AR 33-35, 41, 44.[1]

2. In June of 1989, the Immigration and Naturalization Service (INS) charged petitioner with being deportable from the United States under 8 U.S.C. 1251(a)(11), which authorizes deportation of an alien who is "convicted of a violation of * * * any law * * * of a State * * * relating to a controlled substance."[2] At the deportation hearing in November 1989 (about four years after petitioner became a permanent resident), petitioner was found deportable as charged, but requested relief under 8 U.S.C. 1182(c), which authorizes the Attorney General to grant certain discretionary relief to "[a]liens lawfully admitted for permanent residence * * * [who have] a

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[1] "AR" refers to the Administrative Record filed in the court of appeals.

[2] This provision was renumbered by Section 602 of the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat. 5077-5082, and now appears as 8 U.S.C. 1251(a)(2)(B) (Supp. II 1990). The amendment, though, does not apply to deportation proceedings commenced before March 1, 1991. See IMMACT § 602(d), 104 Stat. 5082.

lawful unrelinquished domicile [in the United States] of seven consecutive years." [3]

In order to demonstrate that petitioner met the seven-year requirement of the statute, her counsel made an offer of proof that her first entry had occurred in 1982 and that "she had a visitors visa, * * * and she had been residing in the United States and had made trips, short trips back" between 1982 and 1985. AR 36. The immigration judge did not resolve this factual question, but instead denied relief on the basis of the administrative rule, first set forth in *In re S—*, 5 I. & N. Dec. 116, 118 (BIA 1953), that time before the acquisition of permanent resident status does not count toward the seven-year lawful-domicile requirement. AR 24-25.

3. The Board of Immigration Appeals affirmed. Pet. App. 7-9. It noted that it "has consistently held that the seven years must accrue after the alien becomes a lawful permanent resident." *Id.* at 8. Because petitioner clearly had not been a permanent resident for seven years, she was not entitled to relief. Moreover, the BIA questioned whether petitioner had even offered satisfactory evidence to show seven years of residence in any immigration status, and accordingly concluded that she would not have

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[3] Although the statute on its face only authorizes the Attorney General to admit aliens returning to such a domicile, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (BIA 1976); see also *id.* at 32 (Appleman, concurring) (noting that this interpretation of Section 1182(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

been entitled to relief even if it had counted all of her time in this country. *Id.* at 9.

4. The court of appeals denied petitioner's petition for review in an unpublished judgment order. Pet. App. 3-5. The court noted that it had held in *Michelson* v. *INS*, 897 F.2d 465 (10th Cir. 1990), that the seven-year period for eligibility under Section 212(c) "runs from the time the alien is admitted to permanent residence status." Pet. App. 4 (quoting *Michelson*, 897 F.2d at 469). Because petitioner had not met the seven-year requirement, the petition for review was denied.

ARGUMENT

The decision of the court of appeals is correct. Although the Second Circuit has rejected the Board's interpretation of the proper way to calculate the seven-year period under Section 212(c), petitioner would not be entitled to relief under the Second Circuit's decisions, or under the law of any of the other circuits. Accordingly, review by this Court is not warranted.

1. The language of the statute, considered in light of the context in which the statute was enacted and the consistent course of administrative interpretation, supports the decision of the court of appeals. The statute provides only that "[a]liens lawfully admitted for permanent residence * * * who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General." 8 U.S.C. 1182(c). In our view, it is logical to assume that the reference to the unrelinquished domicile as "lawful"—following closely on the initial clause, which limits the provision to aliens "lawfully" admitted for permanent residence—is intended to tie the circumstances in

which an alien can establish the requisite type of domicile to the alien's immigration status, so that the alien can establish the required residency period only by means of a domicile established after the alien is "lawfully admitted for permanent residence"; any domicile established when an alien is not "lawfully admitted for permanent residence" cannot be "lawful."

This reading of the statute gains support from the circumstances of its enactment. This provision —enacted as part of the Immigration and Nationality Act of 1952—replaced the "Seventh Proviso" to Section 3 of the Immigration Act of 1917, which granted similar relief to "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." Act of Feb. 5, 1917, ch. 29, 39 Stat. 878. The Senate Report that preceded enactment of the INA made it clear that the purpose of the revised provision was to limit the Attorney General's discretion to grant relief to aliens "who came in through the front door, were inspected, lawfully admitted, established homes here, and remained for 7 years before they got into trouble." S. Rep. No. 1515, 81st Cong., 2d Sess. 382 (1950). To accomplish this purpose, Congress revised the 1917 statute in two ways: (1) by adding the initial clause, which limits the provision to "[a]liens lawfully admitted for permanent residence"; and (2) by adding the adjective "lawful" to qualify the types of unrelinquished domiciles that would support relief.

The BIA adopted this interpretation shortly after the INA was enacted, in *In re S—*, 5 I. & N. Dec. 116 (BIA 1953). In that case, the BIA reviewed the legislative history of the 1952 revision to the Seventh Proviso and concluded that:

> [T]his provision of law is available only to those lawfully resident aliens who are returning to an unrelinquished domicile of 7 consecutive years subsequent to a lawful entry. In other words, we construe the section to mean that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence; and that not only the admission must be lawful but that the period of residence must be lawful.

Id. at 118. The BIA consistently has adhered to this interpretation. See, *e.g.*, *In re Anwo*, 16 I. & N. Dec. 293 (BIA 1977), aff'd on other grounds, *Anwo* v. *INS*, 607 F.2d 435 (D.C. Cir. 1979); *In re Newton*, 17 I. & N. Dec. 133 (BIA 1979); *In re Kim*, 17 I. & N. Dec. 144 (BIA 1979).[4] The BIA's interpretation is entitled to strong deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408 (1961). Accordingly, the BIA's interpretation should prevail. See *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979) (following *In re S—*); *Chiravacharadhikul* v. *INS*, 645 F.2d 248 (4th Cir.) (same), cert. denied, 454 U.S. 893 (1981); *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990) (same).

2. Petitioner correctly notes that the Second Circuit adopted a contrary view in *Tim Lok* v. *INS*, 548

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[4] The BIA has not, however, adhered to this interpretation in cases arising in the Second Circuit, in deference to the contrary interpretation adopted by the Second Circuit in *Tim Lok* v. *INS*, 548 F.2d 37 (1977). See *In re Anwo*, 16 I. & N. Dec. at 298.

F.2d 37 (1977) (*Lok I*). Acknowledging the difficulty of the problem, see *id.* at 38, the *Lok I* court rejected the BIA's interpretation and concluded that any unrelinquished domicile that did not violate the immigration laws would satisfy Section 212(c), even if the domicile was established while the alien was not lawfully admitted for permanent residence. See *id.* at 39-40. In a second opinion dealing with Tim Lok's case, however, the Second Circuit seriously limited the import of its decision in *Lok I*. See *Tim Lok* v. *INS*, 681 F.2d 107 (1982) (*Lok II*). The court in *Lok II* explained that an alien can establish domicile in the United States only by "establish[ing] an intent to remain." *Id.* at 109. Furthermore, he can "establis[h] *lawful* domicile only when his intent to remain [is] legal under the immigration laws." *Ibid.* Because Tim Lok's initial presence in the United States was unlawful, he could not establish a lawful domicile. Accordingly, the Second Circuit denied Tim Lok's petition for review.

The limited reach of the Second Circuit's rule is evident from decisions of the Fifth and District of Columbia Circuits, which have affirmed BIA orders in this area on the theory that nonimmigrant students cannot establish a "lawful" domicile, without addressing whether the BIA's interpretation or the Second Circuit's should prevail. *Brown* v. *INS*, 856 F.2d 728, 730-731 (5th Cir. 1988); *Anwo* v. *INS*, 607 F.2d 435, 437-438 (D.C. Cir. 1979); see also *Lok II*, 681 F.2d at 109 n.3 (noting that nonimmigrant students cannot acquire a lawful domicile).[5] Because

[5] Petitioner wrongly suggests (Pet. 8) that the Third Circuit's decisions in *Dabone* v. *Karn*, 763 F.2d 593 (1985), and *Reid* v. *INS*, 756 F.2d 7 (1985), bear on the issue here. Those cases dealt with the question of when a permanent resident *stops* accruing time for Section 212(c) purposes as the result of being found deportable or excludable.

petitioner's status as a nonimmigrant visitor similarly depended on her "having a residence in a foreign country which [s]he has no intention of abandoning and [on her] visiting the United States temporarily for business or temporarily for pleasure," 8 U.S.C. 1101(a)(15)(B), she also could not acquire a domicile in the United States without violating her immigration status. See *Elkins* v. *Moreno*, 435 U.S. 647, 665 (1978) (noting that Section 1101(a)(15)(B) "expressly condition[s] admission * * * on an intent not to abandon a foreign residence, or, by implication, on an intent not to seek domicile in the United States"). Accordingly, petitioner would not have prevailed even in the Second Circuit. Hence, this case presents no occasion for the Court to resolve the conflict on which the petition relies.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

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[6] In any event, as the BIA noted (Pet. App. 9), petitioner failed to introduce at the immigration hearing evidence to establish that she has resided in the United States in any manner for the requisite seven years; accordingly, whatever view one may take of the statute, it would remain unclear that petititioner was entitled to relief.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1992 312-324 45354